APPEAL NO. 040445
FILED APRIL 21, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on February 4, 2004. The hearing officer decided that the appellant (claimant herein) is not entitled to lifetime income benefits (LIBs). The claimant files a request for review, arguing that the hearing officer's determination that the claimant was not eligible for LIBs was contrary to the evidence. The respondent (self-insured herein) replies that the hearing officer's decision should be affirmed.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

It was undisputed that the claimant sustained a compensable injury on _____, and that as a result of this injury she has undergone bilateral knee replacement. The claimant contended that she was entitled to LIBs for the total loss of use of both feet.[1] The hearing officer determined that the claimant was not entitled to LIBs as the claimant did not suffer the total loss of use of her feet. The claimant argues that this determination was contrary to the evidence, while the carrier argues that the evidence supports the decision of the hearing officer.

Both parties recognize that the Appeals Panel has held on many occasions that the correct legal standard for determining whether there is entitlement to LIBs based upon total loss of use is found in Travelers Insurance Company v. Seabolt, 361 S.W.2d 204 (Tex. 1962) (hereinafter Seabolt), which provides that the standard is whether the members no longer possess any substantial utility as members of the body or whether the condition of the members is such that the claimant cannot get and keep employment requiring the use of the members. We explained in our decision in Texas Workers' Compensation Commission Appeal No. 94689, decided July 8, 1994, as to why the Seabolt standard applied to the 1989 Act and have followed that holding ever since.

The question of whether or not the claimant met the disjunctive test of Seabolt turns upon factual determinations. In the present case, the hearing officer found that the claimant failed to meet either of the disjunctive prongs of Seabolt when she made the following Findings of Fact:

4. The evidence was insufficient to establish that the Claimant's feet no longer possess any substantial utility as a member of the body.

5. The evidence was insufficient to establish that the Claimant's [sic]

[1] Pursuant to Section 408.161(a)(2) a claimant is entitled to LIBs for the permanent and total loss of use of both feet at or above the ankle.

condition of the injured worker is such that she cannot get and keep employment requiring the use of both feet at or above the ankle.

Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given to the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, we find no legal basis upon which to reverse the hearing officer's Findings of Fact Nos. 4 or 5, or the legal conclusion, which is based upon Findings of Fact Nos. 4 and 5, that the claimant is not entitled to LIBs.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

RON JOSSELET, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.

For service by mail the address is:

RON JOSSELET, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Michael B. McShane
Appeals Panel
Manager/Judge

_____
Edward Vilano
Appeals Judge